Supreme Court, U.S.
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No. 03-1012

In The Supreme Court of the United States

SHARON S.,

Petitioner,

v.

ANNETTE F.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF AMICUS CURIAE OF THE PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF THE PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice William H. Rehnquist and the Honorable Justices of the Supreme Court of the United States:

Amicus Curiae Pacific Justice Institute ("PJI") respectfully submits the following Brief in support of the Petition for Writ of Certiorari by Sharon S.

I. INTEREST OF THE AMICUS CURIAE

Amicus curiae Pacific Justice Institute[1] (PJI) is a non-profit organization that provides legal assistance to individuals and groups whose civil rights have been infringed upon in violation of Title VII of the Federal Civil Rights Act and the United States Constitution. As an organization dedicated to protecting the family and parental rights, PJI is generally dedicated to constitutional support of the traditional two parent family, and opposed to governmental intervention in the parent-child relationship, absent a showing of parental unfitness. PJI has also submitted an Amicus Curiae Brief to the Supreme Court in Support of Respondent in *Elk Grove School Dist. v. Newdow,* 124 S.Ct. 384, *cert. granted* (U.S. Oct. 14, 2003) (No. 02-1624).

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the amicus curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *See* S. Ct. Rule 37.6.

II. SUMMARY OF THE ARGUMENT

PJI asks that the Supreme Court of the United States review the following legal issues in the Supreme Court of California's determination mandating the finalization of the adoption of Joshua (Joshua), the son of birth parent Sharon S. (Sharon), to her former same-sex partner Annette F. (Annette). *See Sharon S. v. Superior Court*, 31 Cal. 4th 417, 73 P.3d 554 (2003); *see also*, Petition for Writ of Certiorari, *Sharon S.*, No. 03-1012. Through its decision, the Supreme Court of California has effectively authorized group adoption. The Amicus believes that group adoption is unprecedented in American jurisprudence, constitutes an absurd result forbidden by canons of statutory construction, strips the adopted child of constitutionally protected property and liberty interests, and sets a dangerous course for the nation as a whole. The California high court has also made its decision in violation of a fit custodial parent's substantive due process rights to control the care and custody of her child, pursuant to the Fourteenth Amendment to the United States Constitution.

III. ARGUMENT

A. The California Supreme Court's Authorization for More than Two Persons to Become a Child's Adoptive "Parents" Impairs the Adopted Child's Property Rights and Liberty Interests, and Sets a Dangerous Course for the Nation as a Whole.

1. The California Supreme Court's Decision Improperly Permits a Child to be Adopted by More than Two Parents.

Parental numerosity is indeed a federal issue. The California Supreme Court has now actually authorized any combination of persons to become the adoptive "parents" of children too young to even speak, as long as a trial court judge in a closed proceeding gives approval. This decision therefore opens the door to legally authorized group adoption, adoption by cults and communes, adoption into polyamorous "families" in which all the adults adopt all the children, as well as other possible multi-parent combinations. This bizarre result strips the adopted child's property rights under intestate succession, and strips the liberty right limiting the number of persons who may administer corporal punishment to only two parents.

Furthermore, this result is completely unprecedented in American jurisprudence, constitutes an absurd result forbidden by canons of statutory construction, and sets a dangerous course for the nation as a whole. Indeed, California has had adoption statutes on the books since 1872, giving it over 130 years of adoption jurisprudence. Only Mississippi, Texas, Vermont and Massachusetts have had adoption laws in place longer than California, with Mississippi's 1846 law being the oldest. Thus, due to California's lengthy history of adoption jurisprudence, as

well as its status as the most populous state in the Union, California's case law covers adoption in much greater detail than any of the other 49 states. In fact, since there was no English common law on the subject of adoption (see Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 (1971); Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743 (1956); Brosnan, *The Law of Adoption*, 22 Colum. L. Rev. 332 (1922)), it is the California Supreme Court which is essentially the "Blackstone" of adoption law. Consequently, California case law, such as the dangerous *Sharon S.* decision now at issue, is almost always reviewed whenever any question of adoption law in any state is under consideration.

The first pressing federal issue that the amicus asks the Supreme Court to consider is whether the California Supreme Court, through an overly-expansive reading of case law, and through an absurd interpretation of statute, has usurped legislative intent and authority, and has effectively thrown the gates open to group adoption through its *Sharon S.* decision. Group adoption is repugnant to the deeply held belief, and indisputable phenomenon, that two parent families are the bulwark of Western culture. While, through consequence or by choice, two parent households do not always exist; they are the standard and ideal norm of human culture. Whereas, three or more parents have never been generally recognized as a desirable or suitable familial construct.

The dissenting opinion of Justice Baxter (Chin, J., concurring) acknowledges that the majority's principle ruling, recognizing second parent adoption, is unremarkable, and is the status quo in 20 other jurisdictions. *Id.* at 447. However, he then stated the obvious corollary of the

majority's ruling: "[T]he majority all but guarantees new and even bizarre family structures." *Id.* at 451 (meaning group adoption). Writing a majority opinion that improperly deferred to the interpretation by the California Department of Social Services of the California Family Code, Justice Werdegar offered no legal assurance that the outcomes mentioned by Justice Baxter will not occur, only the claim that such a scenario "has not materialized." *Id.* at 440. However, the simple assertion that something has not "materialized" disregards the issue. One does not need to create complicated scenarios of adoption cults to see an imminent possibility. If granted this adoption, there is no legal barrier to Annette marrying or forming a domestic partnership under California law, and then completing a stepparent adoption, thus installing a third parent in Joshua's life. In fact, under Justice Werdegar's analysis, it's not clear that Sharon's consent to a subsequent stepparent adoption would be "required" under California Family Code § 9006(b) if the court is not cutting off Sharon's parental rights.

The Supreme Court of California also squeezed an entirely new meaning out of *Marshall v. Marshall*, 196 Cal. 761, 239 P. 36 (1925), in order to implement a court-made policy of adoption. *See Sharon S.*, 31 Cal. 4th at 417 (construing *Marshall's* interpretation of the predecessor to Family Code § 8617). In addition, the California Legislature has prescribed the terms by which a child may gain a second parent without losing the first parent. *Id.* at 460-461. The majority had no authority to reject this legislative rule for one it deemed preferable. *Id.*

The majority in *Sharon S.* contended that their reading of Family Code § 8617 did not "speak to parental numerosity." *Id.* at 427. However, the California Supreme

Court previously construed the predecessor of Family Code § 8617 to imply that the number of legal parents a child may acquire through adoption is limited to two. *Estate of Jobson*, 164 Cal. 312, 128 P. 938 (1912) (situation where the biological father sought a distribution of his decedent son's estate, after decedent son had been adopted by his maternal grandparents years before). One need only reference the overwhelming bulk of statutory law and commentary in order to find that the common-sense understanding of adoption limits parental numerosity. *See, e.g.*, Alexa E. King, *Soloman Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA Women's L.J. 329, 386 (1995) ("[e]xisting law recognizes a maximum of two parents per child."); John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 Me. L. Rev. 523, 573, fn. 226 (2001) ("innumerable state and federal statutes . . . are premised on a maximum of two parents"). Simply put, two parents are the limit conceived of within the law.

California Family Code § 8617 states that "[t]he birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child." In *Sharon S. v. Superior Court*, the California Supreme Court held that Family Code § 8617 is a nonmandatory consequence of an adoption and can be waived *whenever* the parties agree to do so. *Sharon S.*, 31 Cal. 4th at 426, 427. The majority seemed to be intent on pounding the square peg of Family Code § 8617 into the round whole of second parent adoption. *See id.* at 447 (Baxter, J., concurring and dissenting) (Under the majority's approach, Family Code § 8617's termination of the birth parents' rights in *any* type of

adoption – not merely those that seek to add a second parent – can be waived by mutual agreement, thus permitting a child to have three or more parents.).

Classifying Family Code § 8617 as *directory* allows the parties in any type of adoption to disclaim its effect. "Consequently, any number of consenting adults may thus agree to adopt the same child, so long as a single family court judge finds the adoption is in the child's interest." *Id.* at 450. "Nothing in the Family Code would be left to prevent a child from having three or four or a village's worth of legal parents, so long as all the would-be parents agree to waive section 8617 and a sole family court judge sometime, somewhere, finds the adoption to be in the child's interest." *Id.*

2. If Adoption Is Compelled, Joshua Will Lose a Property Right Under California Laws of Intestate Succession.

Joshua's rights arising under inheritance law (and various other statutes that are triggered by an adoption), which flow from his relationship to Sharon, were impaired by the arbitrary and capricious decision of the California Supreme Court. The authorization of group adoption is repugnant to the mores and values of American society. These mores and values serve as the foundation for a wide spectrum of legal principles governing interpersonal relationships, including those legal principles related to inheritance and intestate succession. However, the California Supreme Court's decision has now cast a cloud of great uncertainty as to the scope of these principles.

More specifically, under California Probate Code § 6450(b), the relationship of parent and child exists between an adopted person and that person's adopting

parent or parents. Probate Code § 6451(a) then provides a general rule that the adoption severs the parent-child relationship between an adopted person and his or her natural parent. However, just as the stepparent adoption statutes provide exceptions to various rules about adoption procedure, Probate Code § 6451(a)(2) and (b) essentially states that for inheritance purposes a stepparent adoption does not sever the parent-child relationship between an adopted person and his or her adopted-out natural parent. The Probate Code has no provision whatsoever to accommodate second-parent adoptions. Therefore, for purposes of intestate succession, Joshua's right to inherit under intestate succession from his natural parent, Sharon, is stripped.

Joshua's property rights under the California Probate Code may be inchoate in some respect, but his intestate status is determined at the time of adoption, and final: Therefore, his injury may be seen as imminent.

3. Joshua Has a Liberty Interest in Limiting Corporal Punishment Authority to His Natural Parent and Certain Persons Who Become Adoptive Parents According to the Statutory Procedure.

The clear import of California Welfare & Institutions Code § 300(a) and (j)[2] is that only a parent may subject a

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[2] Cal. Welf. & Inst. Code § 300(a), (j).

Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or

(Continued on following page)

child to reasonable corporal punishment. Justice Werdegar's decision fails to recognize that a child clearly has a liberty interest in having corporal punishment authority limited to natural parents and certain persons who become adoptive parents according to the statutory procedures. In addition, as mentioned above, there would be nothing to prevent Annette from marrying someone in the future and then completing a stepparent adoption. In such an instance, Joshua would be legally subject to parental discipline by three different individuals.

Sections 2 and 3, *supra*, are but two examples of the numerous potential problems that group adoption would create. "The existence of multiple parents would also make more difficult the resolution of disputes that may arise over custody and visitation, as well as conflicts over other parental rights and responsibilities." *Sharon S.*, 31 Cal. 4th at 452 (Baxter, J., dissenting). To avoid these problems, and to maintain some level of certainty and consistency in ascertaining the constitutional rights of all of the parties, including the child, PJI requests that the United States Supreme Court grant certiorari, and reverse the decision of the California Supreme Court.

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guardian. (j) The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.

B. Completely Unrelated Third Party's Adoption of a Child Over The Objection of a Fit Custodial Parent Who Retains All Parental Rights Would Violate That Parent's Substantive Due Process Rights.

Historically, this country's jurisprudence has honored parents' authority over the care, custody and control over their minor children. The common law sources of American law have recognized that natural bonds of affection lead parents to act in the best interests of their children. 2 J. Kent, *Commentaries on American Law* 190. The Supreme Court has held that the Fourteenth Amendment's Due Process Clause, construed in light of history and tradition, protects the integrity and autonomy of the family from intrusive intervention by the State at third parties' request. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 533 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000). "The liberty interest, of parents, in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. The concept of parental rights is firmly rooted in the tradition and history of this nation. *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 533. "The child is not the mere creature of the State." *Pierce*, 268 U.S. at 535. It is "cardinal" with the Court "that *the custody, care and nurture of the child reside first in the parents,* whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158 (1944) (emphasis added).

Troxel also held that "[t]here is a presumption that fit parents act in the best interests of their children," and as

long as a parent adequately cares for his or her children, i.e., is fit, there will normally be no reason for state to inject itself into private realm of the family, in order to further question the ability of that parent to make the best decisions as to rearing of that parent's children.["] *Troxel*, 530 U.S. at 68. "[O]ur constitutional system . . . has historically recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 304 (1993) (alteration in original) (internal quotation marks and citations omitted)).

The Supreme Court has further recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children in the following cases: *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"). Recognizing this established jurisprudence, this Supreme Court held, "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the

fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66.

Annette, in her Brief in Opposition to Petition for a Writ of Certiorari, erroneously inflates the perceived distinction that, in *Troxel*, "the jurisdictional fact (at issue) was the fit single parent's unwavering opposition to grandparental visitation." Respondent's Brief in Opposition to Petition for Writ of Certiorari at 1, *Sharon S.*, No. 03-1012. Annette exclaims, "What gives?" *Id.* What "gives" is that the creation of rights vested in one party always results in a corresponding restriction, limitation or elimination of the rights of other parties. See, Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 28-59 (1913). Here, those other parties are the mother and her child. Therefore, even if one were to characterize the California Supreme Court's decision as creating rights, the intrusive attempt to create a boundless right to second parent adoption over the objection of a fit custodial parent has disastrous consequences. Here, a third party, completely unrelated, not part of the household, and a legal stranger to the child in question is indeed attempting to restrict, limit and eliminate many of the rights that the mother and child should be entitled to enjoy. The California Supreme Court erroneously noted that Annette's status was distinct because she was a "prospective adoptive mother," as opposed to the "any person" in the Washington statute at issue in *Troxel*. *Sharon S.*, 31 Cal. 4th at 455. The simple designation of "prospective adoptive mother" is not sufficient to boost Annette's rights beyond those constitutional rights to determine the care and custody of a fit parent's natural child. Sharon retains all rights and responsibilities in

regard to her son. Annette has no biological or legal relationship to Joshua and should not be entitled to interfere in the relationship between mother and child.

IV. CONCLUSION

For the reasons set forth in this brief, PJI respectfully supports the request that the Petition for Certiorari of Sharon S. be granted.

Respectfully submitted,

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